# GEORGIA CASE LAW UPDATE

PRESENTED AT THE DEKALB BAR ASSOCIATION CLE SEMINAR
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BY:

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The following are recently decided cases which address family law issues. While we do not claim that these are all the relevant family law cases of 2002 and 2003, we believe they are significant, and for this reason, are included.

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# GEORGIA CASE LAW UPDATE

## I. DIVORCE, ALIMONY AND EQUITABLE DISTRIBUTION

### Gardner v. Gardner, 276 Ga. 189, 576 S.E.2d 857 (2003)

Facts: Husband filed for divorce and sought custody of the parties' minor child, child support and an equitable division of property. Husband's complaint for divorce asserted that the only marital property was stock in three wholly owned corporations. On his financial affidavit, Husband showed a gross monthly income of $4,583.00 and listed the three corporations as his only assets.

Wife filed an answer and counterclaim for divorce in which she requested alimony and equitable division of property including the marital residence. She listed no assets on her financial affidavit. She sought a court order to allow her to join two of the three corporations as party-defendants in her counterclaim. Wife alleged that following the filing of her answer and counterclaim, she learned that Husband was the sole director and stockholder in the two corporations, and those corporations held title to all of the parties' assets including the marital residence. Wife claimed that jurisdiction over the corporations was proper and that joinder of the corporations was necessary to enable an equitable division of marital property and to address her counterclaim for alimony.

The trial court joined the two corporations at issue and certified its joinder order for immediate review. Husband filed an application for interlocutory appeal.

Issue: By ordering the joinder of the defendant corporations, whether the trial court erred in failing to limit the corporations' participation in Wife's claim for equitable division of marital

property.

Holding: The trial court's joinder of the corporations as defendants to Wife's counterclaim for divorce was not an abuse of discretion. The trial court should make it clear that the corporations are joined for the limited purpose of ascertaining what constitutes marital property. Here, adding the corporations as party-defendants was proper for the limited purpose of determining the marital property and equitably dividing the marital property. Joinder was necessary in order to adjudicate the marital claims because Husband's individual assets and the parties' marital assets were subsumed in the corporate stock.

Rationale: Any property that may have been designated as marital property was inextricably commingled with the corporations by Husband's own doing. A different result would enable a party in a divorce to protect marital assets and prevent equitable distribution by titling marital assets in a wholly owned corporation.

**Melcher v. Melcher, 274 Ga. 711, 559 S.E.2d 468 (2002)**

Facts: Wife filed for divorce in June 2000. Husband retained an attorney but did not file an answer. However, Husband's attorney engaged in settlement negotiations for several months with Wife's attorney. Wife's attorney scheduled the final divorce hearing for December 18, 2000 even though she had previously filed for leave of absence for a two week period that included December 18, 2000. Additionally, Wife's attorney did not give notice of the hearing to Husband's attorney. On December 14, 2000, Wife's attorney sent a letter to Husband's attorney which mentioned the parties' settlement negotiations but did not mention the final hearing date.

Although Wife and her attorney appeared, Husband and his attorney did not appear at the final hearing because they had no notice. The trial court entered a final judgment. Husband filed a motion for new trial which the trial court granted based on the conduct of Wife's attorney.

Issue: The scope of the trial court's discretion to grant a new trial following the entry of a final judgment and decree of divorce when the defendant did not receive notice and did not appear for the final trial.

Holding: The Supreme Court affirmed the trial court's granting of a new trial. The Court noted that generally, a party's failure to file an answer in a divorce proceeding waives that party's right to notice of the final hearing. However, in this case, Husband had good cause for not attending the final hearing. As such, the trial court did not abuse its discretion in granting Husband a new trial.

Rationale: The Supreme Court noted that the parties had engaged in settlement negotiations for several months before Wife's attorney sent the December 14 letter, and the letter clearly stated that Wife was ready to continue settlement negotiations. The Court noted the contradiction between the contents of letter and the fact that Wife's attorney had already scheduled the case for a final hearing to occur a few days later. Furthermore, Wife's attorney had previously obtained a leave of absence for the hearing date. Based on these circumstances, the Court determined that a reasonable person would conclude that no final hearing was imminent, and because the actions of Wife's attorney caused the misunderstanding, Husband showed good cause for not attending the final hearing.

**James v. James, 275 Ga. 165, 562 S.E.2d 506 (2002)**

Facts: Wife filed action for divorce. Husband was personally served with a copy of the complaint, but Husband did not file an answer. Wife's attorney obtained a temporary hearing date but had the case continued. The trial court scheduled a status conference. Husband was given notice of the status conference, but Husband did not appear. At the status conference, the case was set for bench trial. Husband was not given notice of the trial date, and he did not appear.

Wife appeared and was granted a divorce. Eighteen (18) months later, Husband learned of the divorce, and he filed a motion to set aside judgment based on lack of notice. The trial court denied Husband's motion. The Supreme Court of Georgia granted Husband's application for discretionary appeal

Issue: Whether the trial court erred in this divorce case by denying Husband's motion to set aside judgment because Husband was not given adequate notice of the trial date.

Holding: The Supreme Court affirmed the trial court's denial of Husband's motion to set aside the divorce judgment and held that lack of notice of the trial was not a grounds upon which the trial court could set aside the judgment.

Rationale: The Court relied on previous decisions and O.C.G.A. § 9-11-5(a) which provides in part:

> [T]he failure of a party to file pleadings in an action shall be deemed to be a waiver by him . . . of all notices, including notices of time and place of trial . . . and all service in the action, except service of pleadings asserting new or additional claims for relief.

The Court found that because Husband failed to file a defensive pleading, he was not entitled to further notices, and he waived notice of the final divorce hearing. The Court distinguished this case from Melcher (above) because unlike the defendant in Melcher, Husband neither retained an attorney nor participated in settlement negotiations with Wife's attorney.

## II. CHILD CUSTODY

### A. *Initial Determination*

**Arnold v. Arnold, 275 Ga. 354, 566 S.E.2d 679 (2002)**

Facts: Husband filed for divorce and sought custody of the parties' minor children. The trial court granted primary physical custody of the children to Wife. The trial court also prohibited the children from having contact with a certain friend of Wife and required Wife to ensure that the children had no exposure to Wife's friend.

Wife filed a motion for new trial requesting that the trial court remove the restriction from the divorce decree. The trial court denied Wife's motion, and Wife applied for discretionary appeal.

Issue: The Supreme Court granted Wife's application to determine whether the restriction complies with the standard set forth in Brandenberg v. Brandenberg, 274 Ga. 183, 184(1), 551 S.E.2d 721 (2001).

Holding: Placing an unauthorized restriction on Wife's exercise of her rights as a custodial parent was an abuse of discretion.

Rationale: It is an abuse of discretion for the trial court to prohibit a parent from exercising his or her custodial rights in a third party's presence if there is no evidence to show that exposure to a third party will adversely affect the best interests of the children.

**Burns v. Burns, 253 Ga. 600, 560 S.E.2d 47 (2002)**

Facts: Mother and Father were divorced in Georgia in 1995, and Father was granted full custody of the parties' three minor children. In 1998, Mother filed a contempt against Father, claiming that Father refused to allow her visitation with the children. The parties entered into a Consent Order which modified Mother's visitation rights. The Consent Order provided in part: "There shall be no visitation or residence by the children with either party during anytime where such party cohabits with or has overnight stays with any adult to whom such party is not legally married to or to whom party is not related within the second degree."

In July 2000, Mother and her female companion traveled to Vermont where they received a license and certificate of civil union. Father filed a motion for contempt, alleging that Mother violated the Consent Order by exercising visitation while cohabiting with her female companion. The trial court found that the Order was enforceable and a civil union was not a marriage. The trial court held Mother in contempt.

Mother appealed stating that she was married to her female companion in Vermont and pursuant to the full faith and credit doctrine, she was married in Georgia as well. In addition, Mother argued that she had a fundamental privacy right the Georgia could not limit and that this privacy right included the right to define her own family.

Issue: Whether the trial court erred in enforcing a Consent Order in which the parties agreed that no child visitations would occur with a parent when that parent cohabits with or has overnight stays with any adult to whom such parent is neither legally married to nor related within the second degree.

Holding: Because the language of the Consent Order states that neither party shall cohabit with an adult to whom he or she is not legally married, and because Mother and her female companion were not legally married in Vermont or Georgia, Mother violated the Consent Order. Moreover, Mother waived any right to privacy of intimacy when she voluntarily agreed to the Consent Order.

Rationale: The Court of Appeals found that Wife and her female companion entered into a civil union but were not married. The Court of Appeals explained that Vermont law distinguishes marriage from a civil union. The Court of Appeals asserted that even if Vermont had legalized same-sex marriages, those marriages would not be recognized in Georgia. O.C.G.A. § 19-3-3.1(a)

states that Georgia public policy "recognize[s] the union only of man and woman. Marriages between person of the same sex are prohibited in this state." Additionally, O.C.G.A. § 19-3-3.1(b) provides in part, "No marriage between persons of the same sex will be recognized as entitled to the benefits of marriage, and any marriage entered into by persons of the same sex pursuant to a license issued by another State or foreign jurisdiction will be void in this State. [T]he courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage. . . ." The Court noted that Georgia is not required to give full faith and credit to same-sex marriages of other states.

**Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001)**

Facts: Husband appealed final judgment and decree of divorce. Husband and Wife married in 1976 and have six children of which five are minors. In 1995, Husband began an extramarital affair with Dana Pike who lived in another state. Husband relocated Pike to Atlanta after Husband learned that Wife was pregnant with the parties' sixth child. In 1997, when the sixth child was about one month old, Husband told Wife of the affair, left the house and filed for divorce. Husband and Pike had lived together for two and a half years by the time of trial; however, the children had never met Pike.

Following a jury trial, the trial court granted Husband and Wife joint custody with Wife having primary physical custody. Husband was awarded visitation rights, but the provisions of the divorce decree prevented Husband from exercising visitation in the presence of Pike, even if Husband and Pike married.

In accordance with the verdict, Husband was ordered to pay $962 per month in child support and contribute as additional child support an $200 per month to the childrens' custodial accounts. Husband filed an application for discretionary appeal.

Issue: Whether the trial court abused its discretion by: (1) imposing the restriction which precludes Husband from exercising visitation in the presence of Pike, whether or not they legally married; and (2) requiring Husband to contribute to $200 per month to the childrens' custodial accounts.

Holding 1: The trial court erred in prohibiting Husband from exercising visitation in Pike's presence because there was no evidence to show that the children's exposure to Pike would adversely affect the children. If it was shown that Husband's relationship with Pike adversely affected the children, then certain limitations could be imposed on his visitation rights.

Holding 2: The trial court did not err by including the provision requiring Husband to contribute to the custodial account. Because the account was established prior to the divorce being filed and because the account was created pursuant to the Georgia Transfer to Minors Act, O.C.G.A. § 44-5-110, then pursuant to Georgia law, the funds could be used for any reason deemed necessary by the custodian for the support, maintenance, education, general use and benefit of the children. In this case, the use of the funds in the custodial accounts does not clearly contemplate use beyond age 18 and is not restricted children's post-minority college education.

The Court distinguishes this case from Coleman v. Coleman, 240 Ga. 417(5), 240

S.E.2d 870 (1977), in which the Court struck down a provision in a divorce decree which required the father to establish an education trust fund and completely fund the trust fund by the children's sixteenth birthdays and which would revert to him if the child did not enroll in college by age twenty-two (22). Even though all funds were required to be paid by the time the children reached age sixteen (16), such a provision was invalid because it considered uses for the funds which extended beyond the age of eighteen (18).

**B.** ***Modification***

**Bodne v. Bodne, -- S.E.2d –, 2003 WL 22533120 (Ga., Nov. 10, 2003)**

Facts: In 1999, a final decree of divorce granted primary physical custody of parties' two minor children to David Bodne ("Father"). The parties shared joint legal custody of the children. The parties agreed to share the children in an equal amount of time, and they anticipated alternating time with the children every two (2) weeks. In 2001, Father remarried, and he informed his ex-wife, Rachel Ann Bodne ("Mother") that he planned to move with the children to Alabama. Father filed a petition to modify Mother's visitation in contemplation of his upcoming move. Mother filed a counterclaim in which she opposed the move and sought primary physical custody of the children. The trial court awarded primary physical custody to Mother. Father appealed.

The Court of Appeals reversed, finding that the evidence did not support a change in custody, and "in the absence of any reasonable evidence of a substantial change in material condition affecting the welfare of the children, *see* Ormandy v. Odom, 217 Ga.App. 780(1), 459 S.E.2d 439 (1995), where one parent is designated the primary physical custodian and moves out of state, the relocation alone cannot constitute a sufficient change in condition to modify custody. Bodne v. Bodne, 257 Ga.App. 761, 572 S.E.2d 95 (2002). The Court of Appeals held further that the relocation of the children to Alabama could necessitate a modification of Mother's visitation rights.

The Supreme Court granted Mother's petition for writ of certiorari.

Issue: How much weight should be given to the move to another state by a custodial parent in an action by the non-custodial parent seeking a change in primary physical custody?

Holding: The Court of Appeals erred in holding that a trial court may presume that a relocation by the custodial parent is in the best interests of the child. *Reversed.*

Rationale: The trial court must consider the best interests of the child when making a determination in relocation cases. The trial court cannot apply a rule that automatically assumes that relocation is in the best interests of the child unless proved that the relocation places the child at risk. The Supreme Court overruled Ormandy v. Odom, *see infra*, and all other Georgia cases that presume that the custodial parent has a prima facie right to retain custody unless the non-custodial parent demonstrates "that the environment of the proposed relocation endangers a child's physical, mental or emotional well-being."

**Staffon v. Staffon, 587 S.E.2d 630 (Ga., Oct. 6, 2003)**

Facts: Appellant Clinton Staffon and appellee Serena Staffon divorced in July 2001. The parties entered into a settlement agreement that was incorporated into the divorce decree and which resolved all issues of the marriage including child support and property division. Mr. Staffon earned approximately $40,000.00 per year, and he agreed to pay $648.00 per month in child support for the parties' minor child. The parties also agreed to divide equally the equity in the marital residence, and Serena Staffon gained exclusive use of the residence and was responsible for the mortgage, utilities and taxes associated with the residence.

Appellant was under indictment for felony drug possession and had been released on bond at the time the divorce decree was entered. Appellant made timely child support payments until September 13, 2001, at which time he began serving a six year prison sentence for drug possession. Appellant made no child support payments since that time. In October 2001, as payment for his attorney, appellant transferred his one-half interest of the equity in the marital residence to his attorney.

Subsequently, appellant filed a petition seeking a downward modification in child support, contending that the substantial decrease in his income due to his incarceration warranted a reduction or suspension of his child support obligation. Specifically, appellant requested that his support obligations be terminated while he was incarcerated, and that commencing ninety (90) days after his release, he be ordered to pay twenty percent (20%) of his gross income.

The trial court denied appellant's request for reduction of his child support obligation.

Issue: Whether incarceration due to voluntary illegal conduct warrants a downward modification of child support.

Holding: Imprisonment of a child support obligor for voluntary criminal acts is not a ground for a reduction in child support obligations.

Rationale: A child support obligor should not benefit from his criminal conduct, especially at the expense of his child. Georgia public policy favors ensuring that the children of separated or divorced parents have adequate financial support. Incarceration does not relieve individuals from other financial obligations such as car payments or mortgage payments, and obligation to support a child should be given the same legal status as such other financial obligations. Although appellant's child support arrearage will continue to accrue until he is released from incarceration, he must pay the arrearage based on his income and assets at the time of his release.

**Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003)**

Facts: The parties were divorced in 2001. The parties shared joint legal custody of their two year old daughter with Ms. Scott having primary physical custody. The divorce decree contained an automatic change of custody provision that stated, as follows:

In the event that [Ms. Scott] moves to a residence outside of Cobb County, Georgia, it is

hereby ordered and the court specifically finds, that this event constitutes a material change in circumstances detrimentally affecting the welfare of the minor child and that pursuant to *Carr v. Carr*, 207 Ga.App. 611 [429 S.E.2d 95] (1993), primary physical custody of the minor child shall automatically revert to [Mr. Scott]. This provision is a self-effectuating change of custody provision and no action of the Court shall be necessary to accomplish this change of custody.

Issue: Whether a self-executing change of custody provision in a divorce decree is permissible.

Holding: A self-executing change of custody provision in a divorce decree is impermissible and should be stricken from the parties' divorce decree because it ignores the best interests of the child at the time of the change.

Rationale: The factual situation at the time the custody modification is sought rather than the factual situation at the time of divorce decree determines whether a change of custody is warranted. A self-executing change of custody provision provides "a speedy and convenient shortcut for the non-custodial parent to obtain custody of a child by bypassing the objective judicial scrutiny into the child's best interests that a modification action pursuant to O.C.G.A. § 19-9-3 requires." Such a provision violates public policy as set forth in O.C.G.A. § 19-9-3.

**Todd v. Casciano, 256 Ga. 631, 569 S.E.2d 566 (2002)**

Facts: The juvenile court changed custody of the parties' five children from Mother to Father. The evidence presented at trial demonstrated that Mother frequently cohabited with boyfriends On at least five occasions, Mother and the five children stayed over at the residence of Mother's most recent boyfriend. Due the distance between Mother's house and her boyfriend's house, Mother and the children would have to wake up at 4:00 or 4:30 in the morning in order for Mother to get to work. The clinical psychologist who evaluated the situation did not have enough information to determine whether Mother's cohabitation with her boyfriend had a detrimental impact on the children. The parties' 12 year old daughter published documents on her website that resembled a personal advertisement. Mother had a similar website. Another child began exhibiting behavioral problems, and a third child's academic performance in school worsened.

Issue: Whether the trial court erred in transferring custody from Mother to Father

Holding/Rationale: The Court of Appeals upheld the juvenile court's change of custody. If there is reasonable evidence to support the decision of the trial judge, then that decision will be affirmed on appeal. In this case, the Court of Appeals found that there was no abuse of discretion by the trial court in changing custody from Mother to Father.

**Powe v. Jordan, 255 Ga. 273, 564 S.E.2d 858 (2002)**

Facts: Bennie Powe ("Father") and Daina Jordan ("Mother") divorced in February 1999. The trial court granted the parties joint custody of their two year old daughter with each parent having physical custody of the child for six-month periods. In 2001, Mother filed a petition to change custody. The trial court awarded custody of the child to Mother.

Issue: Father appeals the trial court's decision on the ground that there was no evidence of a substantial change in a material condition which warranted a change of custody.

Holding/Rationale: *Affirmed.* The Court of Appeals found sufficient evidence to support a change of custody. The evidence showed that both Father and Mother were fit parents. However, the evidence also showed that as the child grew older, the change in physical custody every six weeks became a traumatic event. This evidence was sufficient to show a substantial change in a material condition that both affected the best interest of the child and warranted a change of custody to Mother.

## III. CHILD SUPPORT

### Swanson v. Swanson, 276 Ga. 566, 580 S.E.2d 526 (2003)

Facts: Appellant/Husband and appellee/Wife participated in mediation during their pending divorce action. The parties reached a settlement, and their agreement provided, in part, that "[Wife] does not pay child support. Intent that [Wife] would take a lesser amount of alimony in lieu of [paying] child support." Soon after, Husband informed Wife that he would not abide by the settlement agreement because the child support provision in the agreement contained an improper waiver of child support. Subsequently, Wife filed a motion to enforce the settlement agreement, and the trial court entered an order making the mediated settlement agreement an order of the court. The trial court certified its order for immediate review.

Issue: Whether the parties' settlement agreement contains an improper waiver of child support.

Holding: The child support provision in the parties' settlement agreement improperly waives the child's right to child support contrary to Georgia law. The Georgia Supreme Court reversed the judgment of the trial court and remanded the case.

Rationale: The right to child support belongs to the child and cannot be waived by the parties. The language in the parties' settlement agreement that allowed Wife to accept a lower alimony amount in lieu of her paying child support to Husband was an improper waiver of support. Trial courts must consider whether the child support award is sufficient based on both the non-custodial parent's ability to pay and the needs of the child. Further, when determining whether to incorporate a settlement agreement into a divorce decree, the trial court must make specific written findings as to the gross incomes of the parties, and the existence or absence of special circumstances which would justify a departure from the child support guidelines and applicable percentages.

### Hulett v. Sutherland, 276 Ga. 596, 581 S.E.2d. 11 (2003)

Facts: The parties divorced in 1997. The final judgment and decree of divorce which incorporated the parties' settlement agreement provided that Sutherland had a gross income of $4,000 per month. The parties agreed to joint legal custody of their four year old daughter with Hulett having primary physical custody and Sutherland paying $450 per month in child support. The decree found the existence of special circumstances in that Sutherland would pay private school tuition for the child through high school.

In 2002, Hulett filed for an increase in child support based on Sutherland's increased income and the fact that the child no longer attended private school. Sutherland filed a counterclaim seeking a decrease in his child support obligation. During the hearing, Hulett showed that the final decree stated that Sutherland had an annual income of $48,000 in 1997, and she presented Sutherland's pay stubs and tax returns to show that Sutherland has an approximate gross income of $74,500 in 2001. However, the trial court found that Sutherland's gross income in 1997 was $81,500 based on his 1996 and 1997 tax returns instead of $48,000 as stated in the final judgment. The trial court held that Hulett failed to show a substantial increase in Sutherland's income necessary to authorize an increase in support and denied Hulett's petition. The court also denied Sutherland's downward modification petition. Hulett appealed.

Holding: The final judgment and decree of divorce contained a finding regarding income in the amount of $48,000. This finding was conclusive because the final judgment had not been reversed or set aside. Therefore, the trial court could not allow Sutherland to relitigate his 1997 income which had previously been decided on a final basis.

The Georgia Supreme Court reversed denial of Hulett's petition and remanded for the trial court to determine whether there had been a substantial change in Sutherland's income or financial status since 1997 that would warrant an upward modification of child support.

**Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 580 S.E.2d. 206 (2003)**

Facts: Samuel and Michelle Sweat divorced in November 1998 with Samuel having custody of the three minor children and Michelle having visitation. Michelle did not have to pay child support. In July 2000, Samuel, through the Georgia Child Support Enforcement Agency, sought to modify child support. Based on the statutory child support guidelines ("Guidelines"), Michelle was required to pay $452 per month in child support and $79 per month towards health insurance for the children. Michelle challenged the child support amount and the child support guidelines. Following a hearing, the trial court declared that the Guidelines are unconstitutional

Issue 1: Whether the Guidelines violate substantive due process under the Georgia and United States' Constitutions

Holding 1: The Guidelines comply with the substantive due process requirements of the Georgia and United States' Constitutions. Substantive due process analysis of the Guidelines is performed under the rational basis test, which has the lowest level of constitutional scrutiny, because the Guidelines do not affect a fundamental right or involve a suspect class. In order for a statute to survive a due process attack, a statute must be reasonably related to the public health, safety or general welfare. The Guidelines make a necessary distinction between custodial and non-custodial parents. A rational relationship exists between the Guidelines and their goal of ensuring that the non-custodial parent contributes support to protect the welfare of his or her children.

Issue 2: Whether the Guidelines violate equal protection under the Georgia and United States' Constitutions

Holding 2: The Guidelines comply with the equal protection guarantees of the Georgia and United

States' Constitutions. The rational basis test applies in this situation where no fundamental right or suspect classification is involved. Under the rational basis test, a court will uphold the statute if the classifications set forth in the statute have a rational relationship to a legitimate government purpose. Here, there is a rational relationship between the guidelines and the legitimate government purpose of protecting the welfare of children. No equal protection violation exists in this situation because, contrary to the trial court's conclusion, custodial and non-custodial parents are not similarly situated. Therefore, the Guidelines make permissible distinctions between custodial and non-custodial parents and do not discriminate between individuals who are similarly situated.

Issue 3: Whether the Guidelines violate the constitutional right to privacy

Holding 3: Establishing child support payment levels is a public function, and Michelle Sweat has no privacy interest in the process which determines her child support obligation.

Issue 4: Whether the Guidelines resulted in an illegal taking from appellee Michelle Sweat in violation of the Georgia Constitution

Holding 4: The Guidelines do not accomplish an unconstitutional taking of property. According to the Georgia Constitution, a taking occurs when private property is taken or damaged for public purposes without just and adequate compensation being paid in advance. The Guidelines represent Georgia's effort to ensure that children, whose parents are separated or divorced, are provided adequate care. The purpose of the Guidelines is to ensure that non-custodial parents contribute to the cost of supporting their children.

Issue 5: Whether the trial court erred in concluding that due to the "confiscatory nature of the Guidelines," Michelle Sweat could not afford a transcript of the trial court proceeding and thus the state should be ordered to supply her with a trial transcript at no cost.

Holding 5: Michelle Sweat had never been ordered to pay child support. Therefore, the trial court's conclusion, that due to the confiscatory nature of the Guidelines, she could not afford a transcript and should be supplied with a transcript at no cost, had no factual basis.

**Corson v. Marbel, 257 Ga.App. 874, 572 S.E.2d 397 (2002)**

Facts: Corson [Husband] and Marbel [Wife] divorced in 1992. Marbel was awarded custody of the parties' daughter. Corson was ordered to pay child support in the amount of $280 per month, maintain health insurance for the daughter, and pay one-half of daughter's unreimbursed medical expenses. In 2000, child support was increased to $548.32 per month by court order. In May 2001, Corson filed a petition to change custody based on the daughter, then age 16, electing to live with Corson. Corson was awarded temporary custody but no child support.

At an evidentiary hearing, the parties stipulated that the only outstanding issue was whether Marbel should be required to pay child support due to the change of custody. The undisputed evidence showed that Marbel earned a gross monthly income of approximately $2,037.20. Marbel's present husband earned approximately the same amount as Marbel. Marbel and her

husband had a baby who had no special needs.

The trial court denied Corson's request for child support without entering any factual findings.

Issue 1: Whether the trial court erred in denying child support to Corson;

Issue 2: Whether the trial court erred in failing to make written findings of fact to justify a departure from the statutory guidelines.

Holding: The trial court erred in denying child support to Corson without entering any written findings of special circumstances to justify a departure from the statutory guidelines. The statutory child support guidelines as set forth in O.C.G.A. § 19-6-15(b)(5) must be considered by the trial court. The guidelines create a rebuttable presumption that the amount of support indicated by the guidelines is the correct support amount. In order to deviate from the guidelines, the trial court must enter a written finding of the existence of one or more special circumstances in accordance with O.C.G.A. § 19-6-15(c).

Rationale: The fact that Marbel and her current husband have a child does not in and of itself warrant a reduction from the amount of support indicated by the guidelines. The court must determine that the additional support obligation renders the presumptive support amount excessive. The trial court must enter written findings of special circumstances pursuant to O.C.G.A. § 19-6-15(c) if the court decides to deviate from the statutory guidelines.

## IV. LEGITIMATION AND PATERNITY

### Pritchett v. Merritt, 263 Ga.App. 252, 587 S.E.2d 324 (2003)

Facts: Pritchett and Merritt, the parents of three minor children, never married. Merritt filed a petition for legitimation. In her answer, Pritchett requested that the legitimation petition be denied and counterclaimed to terminate Merritt's parental rights. At the conclusion of a hearing, the trial court entered a final order granting the legitimation, granting visitation to Merritt, awarding child support to Pritchett, and dismissing Pritchett's request for termination of Merritt's parental rights for lack of subject matter jurisdiction. The Court of Appeals granted Pritchett's application for discretionary appeal, and affirmed in part and reversed in part the trial court's ruling.

Issue 1: Whether the trial court erred in granting visitation to Merritt

Holding 1: The trial court could not grant visitation to Merritt in a legitimation proceeding without Pritchett's consent. The grant of visitation privileges to the non-custodial father resulted in a modification of the mother's custody. Further, when one party's visitation rights are increased, the other party's custodial rights are affected and diminished. In a legitimation proceeding, custody issues may be adjudicated ***only with the consent of the parties***. In this case, neither party consented to addressing custody and visitation issues. Moreover, Merritt did not seek custody or visitation in his petition, and Pritchett did not raise issues of custody or visitation in her answer or counterclaim. If the father wishes to seek custody or visitation in the absence of mother's consent,

father must do so in a separate proceeding after the entry of a final judgment of legitimation.

Issue 2: Whether the trial court erred in granting the legitimation which Pritchett asserted was not in the best interests of the children

Holding 2: Neither a transcript of the hearing nor a statement of facts in accordance with O.C.G.A. § 5-6-41(g) was made a part of the record on appeal. In granting the legitimation, it is implicit that the trial court determined that legitimation was in the best interests of the children. In the absence of a transcript, the reviewing court must assume that sufficient and competent evidence supports the findings of the trial court. Because no transcript was included in the record on appeal, the Court of Appeals was required to assume that the evidence was sufficient to support the trial court's ruling. Because Pritchett failed to show error by the record, the Court of Appeals upheld the granting of the legitimation by the trial court.

**Holmes v. Traweek, 276 Ga. 296, 577 S.E.2d. 777 (2003)**

Facts: Traweek (Father) filed a petition for legitimation of the parties' minor child in his county of residence, Houston County. Holmes (Mother) and child resided in Dooly County. Traweek's petition named Holmes as defendant, and he sought to establish paternity, visitation rights, and to change the child's name. Holmes requested that the case be transferred to Dooly County in accordance with Article VI, Section II, Paragraph VI of the 1983 Georgia Constitution. The trial court denied Holmes' motion to transfer venue and certified its order for immediate review.

Issue: Whether a conflict existed regarding venue provisions between O.C.G.A. § 19-7-22(a), which allowed a father seeking to legitimate a child to file a petition in the superior court of the county in which father resides, and Article VI, Section II, Paragraph VI of the 1983 Georgia Constitution, which provides that a civil case must be filed in the county where the defendant resides (unless the Constitution provides otherwise).

Holding: The venue provision set forth O.C.G.A. § 19-7-22(a), which allowed a father seeking to legitimate a child to file a petition in the superior court of the county in which father resides, is unconstitutional. A legitimation proceeding falls within the provision of Article VI, Section II, Paragraph VI of the 1983 Georgia Constitution. All other provisions of O.C.G.A. § 19-7-22 remain in full force and effect.

Rationale: Traweek contended that venue was proper in Houston County because Holmes was not a defendant in the legitimation proceeding. However, the Court notes that every civil case must have a proper plaintiff and a proper defendant. Although the legitimation statute does not specifically name the mother as a defendant, she is, in fact, a defendant because she must be given notice, she can file objections to the petition, and she can demand a jury trial.

**Banks v. Hopson, 275 Ga. 758, 571 S.E.2d 730 (2002)**

Facts: Mother filed a complaint to establish paternity and for an award of child support against Father, her former boyfriend. In his answer, Father admitted that he was named as the father on the child's birth certificate and that he was paying $750 per month in child support.

Eight months later, Father filed a petition for legitimation, and Mother counterclaimed for child support and requested a jury trial pursuant to O.C.G.A. § 19-7-22(f). The parties consented to the consolidation of the cases.

Mother filed a second jury demand on the day before the specially set bench trial to address child support and visitation issues. The trial court denied Mother's jury demand on the basis that there is no right to a jury trial in a paternity action.

At the bench trial, Father stipulated to paternity and Mother consented to the child's legitimation. The Court declared the child legitimate, set a visitation schedule and ordered Father to pay monthly child support of $1,250.

Mother filed an application for discretionary appeal which the Court of Appeals denied. The Supreme Court granted Mother's petition for certiorari to resolve the conflict between O.C.G.A. § 19-7-22(f) which allows jury trials on child support in legitimation actions and O.C.G.A. § 19-7-40(a) which prohibits jury trials in paternity cases.

Issue: Whether a party in a consolidated legitimation and paternity action is entitled to a jury trial on child support.

Holding: A claim for child support that is part of a petition to establish paternity is not entitled to a jury trial because it falls within the statutory prohibition in O.C.G.A. § 19-7-40(a) against jury trials when a paternity case is consolidated with a legitimation case. Even if the father stipulates to paternity, the case is not converted solely to a legitimation action.

Rationale: The express language of O.C.G.A. § 19-7-40(a) does not support the right of a parent to request a jury trial on child support in a paternity action. The Court examined the legislative intent behind the statutes. The legislature enacted the prohibition on jury trials in paternity actions in order to comply with federal mandates which required states to implement procedures to improve child support enforcement. By eliminating the right to a jury trial, the legislature provided a more efficient means by which parties could establish paternity and child support. The prohibition prevented a father from using a request for jury trial to delay the entry of a child support order.

## V. ENFORCEMENT AND INTERPRETATION OF SETTLEMENT AGREEMENTS

### Carlos v. Lane, 275 Ga. 674, 571 S.E.2d 736 (2002)

Facts: Husband and Wife divorced in 2000. The settlement agreement which was incorporated into the final judgment and decree of divorce required Husband to pay alimony. The agreement specifically provided that "The statutory modification rights waived herein shall include those rights as set out in O.C.G.A. § 19-6-19, et seq."

Following the divorce, Wife entered into a meretricious relationship, and in 2001, Husband petitioned to modify alimony pursuant to O.C.G.A. § 19-6-19(b) which provides, in part, that a former spouse may seek a revision of an alimony obligation if the recipient former spouse cohabits "with a third party in meretricious relationship."

The trial court dismissed Husband's petition for modification of alimony on the basis that Husband relinquished his right to seek a modification.

The Supreme Court granted Husband's application for discretionary appeal.

Issue: Whether the trial court erred in dismissing Husband's petition for modification of alimony on the grounds that the settlement agreement which was incorporated into a final judgment and decree of divorce contained a valid waiver.

Holding: The Supreme Court affirmed the trial court and found that the settlement agreement contained a valid waiver of Husband's right to file an action to modify alimony based on O.C.G.A. § 19-6-19(b).

Rationale: The parties made an express reference to the entire statute [O.C.G.A.§ 19-6-19] by including the language "et seq." which is specific enough to constitute a waiver of Husband's right to seek a modification of his alimony obligations under any subsection of the statute.

## VI. ATTORNEY'S FEES

### Brochin v. Brochin, 277 Ga. 66, 586 S.E.2d 316 (2003)

Facts: Gary Brochin ("Husband") filed for divorce against Susan Brochin ("Wife"). At the conclusion of the trial, the Court entered a final judgment and decree of divorce, but reserved the issue of attorney fees for a later hearing. Wife requested an award of fees in the amount of $83,374. Husband contended that Uniform Superior Court Rule 24.7 prohibits the Court from entering a final judgment and decree of divorce which reserved the issue of attorney fees for subsequent hearing. The Court entered an award of attorney fees in the amount of $40,000 in favor of Wife. The Georgia Supreme Court granted Husband's request for discretionary appeal.

Issue: Whether the trial court is prevented by Uniform Superior Court Rule 24.7 from entering a final judgment and decree of divorce while reserving the issue of attorney fees for subsequent hearing.

Holding: The trial court may enter a final judgment and decree of divorce while reserving the issue of attorney fees for subsequent hearing.

Rationale: Uniform Superior Court Rule 24.7 provides, in relevant part: Although the court may, in appropriate cases, grant judgment on the pleadings or summary judgment that the moving party is entitled to a divorce as a matter of law, no divorce decree shall be granted unless all contestable issues in the case have been finally resolved." The intent of to end the granting of a no-fault divorce without also resolving child custody and alimony issues. The issue of attorney fees often cannot be addressed and adjudicated until after the entry of the final judgment and decree of divorce because the court must consider the prior settlement negotiations and proposals by the parties, the hourly rates of and time billed by the attorneys, and the financial circumstances of the parties following the divorce.

**Monroe v. Taylor, 259 Ga.App. 600, 577 S.E.2d 810 (2003)**

Facts: Mother and Father had a child in 1993 but never married. In 1995, the trial court entered orders providing for custody and support of the child. In 2000, Father filed for a change of custody against Mother based on the conditions on Mother's home. Mother filed a counterclaim for increased child support and for attorneys fees.

The parties resolved the custody matter. Following a bench trial, the trial court awarded Mother increased child support and reserved the issue of attorneys fees. Following a hearing, the trial court awarded Mother attorneys fees pursuant to O.C.G.A.§ 19-6-19(d). Father asserted that Mother was not entitled to an award of attorneys fees because the parties were never married. Father further contended that Mother was not entitled to attorneys fees because her child support modification action was brought as a counterclaim, not as an original action.

Issue 1: Whether the trial court erred in granting attorney's fees pursuant to O.C.G.A. § 19-6-19(d) in actions between never married parents.

Holding 1: O.C.G.A.§ 19-6-19(d) authorizes an award of attorneys fees to a prevailing party in a child support modification action, regardless of whether or not the child's parents were ever married.

Issue 2: Whether Mother is entitled to an award of attorneys fees when her request for child support modification was brought as a counterclaim, not an original petition.

Holding 2: A counterclaim has equal footing with an original claim. The Court finds no basis to distinguish between an action initiated by a complaint to modify child support and action in which a child support claim is added to a pending custody action. Attorneys fees are authorized by O.C.G.A.§ 19-6-19(d) where a party responds to a petition for custody modification and files a counterclaim for modification of support.

Rationale: The Court evaluated the legislative intent behind the drafting of O.C.G.A.§ 19-6-19(d) and the entire chapter of the Domestic Relations Code titled "Alimony and Child Support Generally." Even though the chapter was created to address circumstances relating to divorce and the dissolution of marriage, the legislature intended to provide support for minor children regardless of whether their parents ever married. In addition, the support guidelines apply to children regardless of the marital status of their parents. Following these interpretations, the Court determined that the term "former spouse" is comparable to "parent" when considering issues of child support. As such, O.C.G.A.§ 19-6-19(d) authorizes an award of attorney's fees to a prevailing party in a child support modification action, regardless of whether the child's parents were ever married.

**Wehner v. Parris, 258 Ga.App. 772, 574 S.E.2d 921 (2002)**

Facts: Father filed petition for downward modification of child support. Mother filed answer and counterclaim in which she denied the allegations in Father' petition and requested that his petition be dismissed. Mother also requested an award of attorney's fees pursuant to O.C.G.A. §§ 9-15-14

and 19-6-22. Subsequently, Mother filed a motion for summary judgment. Father amended his petition to add a claim for modification of custody.

The trial court granted summary judgment finding that the evidence was insufficient to warrant a downward modification of child support. The parties entered into a consent order resolving the issue of the child custody modification.

Mother's attorney's fees request in the amount of $13,680.62 remained at issue. Without a hearing, the trial court awarded Mother attorney's fees of $7,500.00.

Issue 1: Whether the trial court erred in awarding attorney's fees in an action involving child support that was amended to include a change of custody request when such award is unauthorized in a modification of child custody action;

Issue 2: Even if the action is properly construed as a child support case, whether the award of attorney's fees was unauthorized in the absence of a hearing to determine if the fees were reasonable and necessary.

Holding: The trial court's award of attorney's fees did not state the basis on which the fees were awarded, whether under O.C.G.A. § 9-15-14 (a) or O.C.G.A. § 9-15-14 (b) and did not set forth findings necessary to allow and award under the statute. Furthermore, it was impossible to determine if and the extent to which attorney's fees were awarded pursuant to O.C.G.A. § 19-6-22. The Court of Appeals vacated the judgment and remanded the case with direction for further proceedings.

Attorney's fees are awardable in an action seeking modification of child support brought by the payor, even when the payor/non-custodial parent also requests a change of custody. The fact that Father amended his action for child support modification by adding a request to change custody does not make the child support issue ancillary to the child custody issue.

On remand, Mother has the burden of proving both the cost and the reasonableness of the attorney's fees. Father has the right to an evidentiary hearing to dispute the cost of the legal expenses and the necessity of the work performed.

Rationale: Attorney's fees are not authorized in either a change of custody action brought by the non-custodial parent or in a change of custody action in which a request for child support is also made. The facts of this case can be distinguished because here, the non-custodial parent requested a change of custody ancillary to seeking a modification of child support. Therefore, an award of fees to the custodial parent is authorized.